James H. Woods, d/b/a Cruise and Tour Services *and* International Longshore and Warehouse Union, AFL–CIO. Cases 21–CA–32819 and 21–CA–33048

April 14, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On May 14, 1999, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief. The Respondent filed a reply brief to each of the two answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, James H. Woods, d/b/a Cruise and Tour Services, San Pedro, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraphs 2(a) and (b) and reletter the subsequent paragraphs.

"(a) Within 14 days from the date of this Order, offer Jean Tober, Pauline Becker, and Myrna Mendoza full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

"(b) Make Jean Tober, Pauline Becker, and Myrna Mendoza whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of my bench decision."

Lisa McNeill, Esq., for the General Counsel.

Gregory G. Kennedy, Esq. (Goldstein, Kennedy & Petito), of Los Angeles, California, appearing on behalf of the Respondent.

William Carder, Esq. (*Leonard, Carder, Nathan, Zuckerman, Ross, Chin & Remar),* of San Francisco, California, appearing on behalf of the Charging Party.

DECISION

BURTON LITVACK, Administrative Law Judge. These matters were tried before me in Los Angeles, California, on March 15 and 16 and April 15, 1999. After oral argument, I issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations. In said the decision, I found and concluded that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Thereafter, I closed the hearing. Appendix B is the portion of the transcript (p. 545, L. 1 through p. 564, L. 21) containing my decision, and Appendix C contains corrections to that transcript [omitted from publication]. In accordance with Section 102 of the Board's Rules and Regulations, I certify the accuracy of the portion of the transcript, as corrected, which contains my bench decision, and said the bench decision and the following recommended order and notice, which is attached as Appendix A, constitute my entire decision in the above-captioned matters. Based upon the findings of fact, conclusions of law, and upon the entire record herein, I issue the following recommended[1]

ORDER

The Respondent, James H. Woods, d/b/a Cruise and Tour Services, San Pedro, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating in the minds of its employees that it is engaging in surveillance of their union or other protected concerted activities.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's conclusion that the Respondent unlawfully discharged Jean Tober, Pauline Becker, and Myrna Mendoza, we do not rely on his statement that there was no evidence that Lilia Schaefer or Vera Smirnoff reported alleged misconduct by Tober or Mendoza to the Respondent. Schaefer, whom the judge credited (as he also did Smirnoff), testified without contradiction that she reported alleged misconduct by Mendoza to Martina Wertz, the Respondent's manager of operations. We find, however, that the Respondent did not rely on this report in deciding to discharge Tober, Becker, and Mendoza.

In adopting the judge's finding, based largely on credibility, that the Respondent waived its 90-day probationary period as to the employees at issue, we find it unnecessary to pass on his opinion that the waiver would have been a good business decision on the Respondent's part.

In adopting the judge, Member Brame finds *Lampi LLC,* 327 NLRB 222 (1998), to be distinguishable. In his dissent in *Lampi*, cited by the Respondent, he noted that where a legitimate motive is established for discipline of an employee, the Board cannot substitute its judgment for that of the employer and unilaterally decide what constitutes appropriate disciplinary action. He further found that the respondent in that case had established a sufficient justification for the discharge of the discriminatee under *Wright Line,* 251 NLRB 1083 (1981), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). By contrast, the judge here made a credibility based rejection of the Respondent's asserted defenses before concluding that the Respondent did not establish a legitimate basis under *Wright Line* for its discharge of the discriminatees under its personnel policies.

[3] We will modify the judge's recommended Order in accordance with our recent decision in *Indian Hills Care Center,* 321 NLRB 144 (1996).

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Interrogating employees with regard to their union membership, sympathies and activities, and the union membership, sympathies and activities of their fellow employees.

(c) Discharging employees because they have engaged in, or are engaging in, union or other protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Offer its employees, Jean Tober, Pauline Becker, and Myrna Mendoza, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs and make them whole, with interest, for any loss of earnings or benefits suffered as a result of their discriminatory discharges in the manner set forth in the remedy section of my bench decision.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under terms of this Order.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful terminations of employees Tober, Becker, and Mendoza, and within 3 days thereafter notify each employee, in writing, that this has been done and that her termination will not be used against her in any way.

(d) Within 14 days after service by the Region, post at its facility in San Pedro, California, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained by for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 22, 1999.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate our employees regarding their union membership, sympathies, or activities or the union membership, sympathies, and activities of their fellow employees.

WE WILL NOT discharge our employees because they have engaged in, or are engaging in, union or other protected concerted acti-vities.

WE WILL NOT, in any like or related manner, interfere with, coerce, or restrain our employees in the exercise of the rights guaranteed to them in the Act.

WE WILL offer our employees, Jean Tober, Pauline Becker, and Myrna Mendoza, immediate and full reinstatement to their former jobs or, if said the positions no longer exist, to substantially equivalent jobs and make them whole, with interest, for any loss of earnings or benefits suffered as a result of their unlawful discharges by us.

WE WILL, within 14 days from the date of the final Order, remove from its files any reference to the unlawful discharges of Tober, Becker, and Mendoza, and WE WILL, within 3 days thereafter, notify each employee, in writing, that this has been done and that the discharges will not be used against them in any way.

JAMES H. WOODS, D/B/A CRUISE AND TOUR SERVICES

APPENDIX B

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JUDGE LITVAK: We will be in order. Let's get on with it. In referring to the parties in the decision, the James H. Woods d/b/a Cruise and Tour Services, I will refer to as Respondent. And the International Longshore and Warehouse Union, AFL–CIO, I will refer to as the Union. And the General Counsel—Is it still acting or is it a regular General Counsel?

MS. MCNEILL: Regular General Counsel.

JUDGE LITVAK: I will refer to Ms. McNeill as counsel for the General Counsel. Mr. Kennedy is counsel for Respondent and Mr. Carder is counsel for the Union.

The original first amended and second amended unfair labor practice charges which are filed in case 21-CA-32819, by the Union, were filed in case 21–CA–32819 by the Union on June 22, September 4, and October 22, 1998, respectively.

The charge in case 21–CA–33048 was filed by the Union on October 22, 1998.

The consolidated, amended complaint was issued by the Regional Director of Region 21 on January 26th, 1999.

The first two days of the trial in these matters, were conducted before me on March 15 and 16, 1999. All parties were and have been afforded an opportunity to examine and to cross examine all witnesses, to offer into the record, any relevant evidence, and to argue their legal positions orally.

Counsel for each of the parties argued orally this

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morning. And I carefully listened to each argument. And I also, in formulating my decision, have carefully considered those arguments.

Based upon the entire record hearing, including the oral arguments of counsel, and my observation of the testimonial demeanor of the witnesses, I am issuing the following Bench Decision.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Just parenthetically, I am not going to discuss jurisdiction or the Union's status as a labor organization, which the Respondent—both of which Respondent has admitted.

BENCH DECISION

[Errors in the transcript have been noted and corrected.]

The issues in the case, are as everyone knows:

1. Did Respondent violate Section 8(a)(1) of the act by on or about June 15th, 1998, stating to employees that it was against the law for them to contact the Union without first consulting the Respondent, impliedly threatening to take unspecified reprisals against employees, interrogating employees, and creating the impression amongst its employees that it had engaged in surveillance of their Union activities.

The second issue is of course, did Respondent violate Section 8(a)(1) and (3) of the Act, by terminating its employees, Jean Tober, Pauline Becker and Myrna Mendoza on June 15, 1998.

Now, what I am going to do now is just briefly recite some facts. If I was writing this decision, I would have each

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witness' testimony set out in great detail. But you all know what the testimony was. And I don't think that I need to elaborate on that factually, in the Bench Decision.

But briefly, Respondent is engaged in the business of providing staff and charting coaches to cruise lines and other customers, including Royal Caribbean Cruise Lines.

For a number of years, Royal Caribbean has subcontracted with Respondent to provide what are called ground services. These include providing individuals to meet customers for the cruise ship, who arrive at the Los Angeles area airports, helping them obtain their luggage, and transporting them to San Pedro where Royal Caribbean ships await their arrival.

And then the reverse process of taking the customers who have finished their cruises and their luggage, hopefully their luggage, back to the airports and to the airlines on which they are traveling.

Royal Caribbean traditionally utilized its own employees to provide all necessary embarkation and debarkation services at the piers at which its cruise ships are docked in San Pedro.

Sometime in 1998 or 1999, Royal Caribbean solicited bids for this latter work. And in early 1999, Respondent was awarded the contract to provide these pier services.

Among the employees who performed this work, are individuals classified as pier hostesses. Each alleged discriminatee was a pier hostess. Their job duties for both the

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embarkation of passengers onto cruise ships and the debarkation of passengers from the same cruise ships, include meeting and greeting customers who are called—I don't know if this is a derogatory term, but who are known as cruisers, manning the information desks, helping with ticketing, and obtaining necessary documentation and helping passengers complete the required documents, checking that all passengers have passports if needed, and returning them to passengers when they debark the ships, and similar duties, like the ones that I have mentioned.

The record establishes that the Respondent began its operations on or about April 3, 1999, and that it utilized the former Royal Caribbean employees who applied for jobs with it. Now, these individuals included the alleged discriminatees.

And finally, with my recitation of facts, there is no dispute that the alleged discriminatees, Jean Tober, Pauline Becker, and Myrna Mendoza, were terminated by Respondent on or about June 15, 1998.

As everyone is well aware, my decision in these cases hinges upon the credibility of each of the five main witnesses in the case, Tober, Becker, Mendoza, Martina Wertz, Respondent's manager of operations, and James Woods, the owner of Respondent.

Having viewed the demeanor of each while testifying, and considering the record as a whole, I find that the most credible of these witnesses was Jean Tober.

Her demeanor was that of an honest and forthright

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witness. And I shall rely on her testimony for all factual findings herein.

In contrast, the witness who I found least credible was Martina Wertz. Her demeanor was that of a most disingenuous witness, one who dissembled, rather than candidly recounting the events herein.

And in that regard, I do not place any reliance upon her testimony.

The remaining two alleged discriminatees, are Becker and Mendoza. These witnesses did not impress me as did Tober. While I found each to be a somewhat truthful witness, I found significant portions of the testimony of each rather incredible, and designed to fit a particular outcome. I shall therefore rely upon Becker and Mendoza, only where specifically corroborated by Tober.

My impression of James Woods' demeanor while testifying is similar to my views of the respective demeanor of Becker and Mendoza.

Thus, on some occasions he seemed to be testifying in a candid manner. On others, particularly when testifying corraboratively with the deceitful Wertz, he impressed me as testifying in a manner designed to establish Respondent's defense, rather than truthfully.

Utilizing these credibility resolutions, I turn to the discharge conversations which occurred on June 15. Now, there is no dispute that Wertz and Woods met with Tober on or about

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4:00 p.m. that day, and that this meeting was a discharge meeting.

I find that during the conversation, between Tober, Wertz and Woods, the latter began by handing the alleged discriminatee her final checks and the discharge letter, and that he then accused her of starting a rumor concerning being paid to the minute.

He then turned to Wertz, who accused Tober of not paying attention to what she had said at a June 5 employee meeting. Tober denied her accusation and repeated exactly what Wertz had said at this meeting.

I further find that at this point, Tober began defending herself, stating that she had seven years of experience and was one of the better employees, was always on time and did a good job. Concluding on these points, she said, "You will have to come up with a better reason that that to fire me."

I find that at this point, Woods responded by asking Tober a question, which he admits asking, whether Tober had met with

any former employees in order to disrupt Respondent's operations; and that, without waiting for a reply, Woods said that he did not want to raise the matter, but that San Pedro is a small town and you were at a meeting with a former employee who is trying to take over my business; that Tober denied Woods' accusation; that she asked if her discharge was due to a personality conflict; that Woods said no, and that Woods

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concluded the meeting by saying her discharge was not due to her job performance and, if Tober remained within the probationary period, he was not obliged to give her a reason for the discharge. The meeting concluded at that point.

There is also no dispute that approximately an hour later, Woods and Wertz met with alleged discriminatees Becker and Mendoza, in order to discharge them.

I find that Becker and Mendoza met with Woods and Wertz at approximately 5:00 p.m.; that Woods began by giving each alleged discriminatee her final check and discharge letter; and that he said that each was terminated and "I think you know why."

I further find that Becker asked Woods several times to explain why; that each time Woods admitted he refused to give an explanation; and that, finally Becker blurted out, "Oh, what, Jim, the Union?" And she added that the Union had been trying to organize the pier hostesses for many years.

I find that Woods responded, stating that San Pedro is a very small town and you could be overheard in public, and you have to be careful what you say. Woods continued, saying, and I am quoting one of the alleged discriminatees, "I assure you, it was not a coworker that told us that you went to a Union meeting at an ex employee's house."

I find that Becker responded to that comment by stating that the meeting that they had attended was just a coffee meeting, and that when employees arrived, they discovered that a

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Union business agent was also there.

I further find that the meeting concluded, with Woods assuring the alleged discriminatees that he would inform the other employees that their termination had nothing at all to do with their job performances.

With regard to the alleged violations of Section 8(a)(1) of the Act, I have found that without prompting, during his discharge conversation with Becker and Mendoza, Woods stated, "I assure you, it was not a coworker that told us that you went to a Union meeting at an ex employee's home."

I[n] my view, clearly Woods was referring to the Union meeting which occurred on June 10 at an ex employee, Marie Wieczorek's home. And I find that such a comment created an impression in the minds of Becker and Mendoza, that Respondent had engaged in surveillance of that meeting. Such a statement was obviously coercive, and I find it violative of Section 8(a)(1) of the Act.

Now, given my credibility to whatever else was said at this meeting, Respondent engaged in no other unlawful activity during it.

However, during the discharge meeting with Tober, Woods admitted asking if she had ever met with any former employees in order to disrupt Respondent's operations. I think that this was a thinly veiled attempt to coerce Tober into admitting having attended the meeting at Marie Wieczorek's house, which Woods

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knew was a Union meeting.

Given the purpose of the entire conversation, and Tober's still undisclosed Union activity, Woods question constituted in my view, unlawful interrogation and was, I find, violative of Section 8(a)(1) of the Act.

I turn now to the crux of the two cases, the alleged unlawful terminations of Tober, Becker and Mendoza.

In determining whether Respondent acted in violation of Section 8(a)(1) and (3) of the Act by terminating the three women, I utilized the analytical framework set forth by the Board in *Wright Line.* Thus, in order to prove a *prima facie* violation of Section 8(a)(1) and (3) of the Act, the General Counsel has the burden of establishing that the alleged discriminatees engaged in Union activities, that Respondent had knowledge of such conduct, that Respondent's actions were motivated by Union animus, and that Respondent's termination of the alleged discriminatees had the effect of encouraging or discouraging membership in the Union.

Further, the General Counsel has the burden of proving the foregoing matters by a preponderance of the evidence. However, while the above analysis is easily applied in cases in which a Respondent's motivation is straightforward, conceptual problems arise in cases in which the record evidence discloses the presence of both a lawful and an unlawful cause for the alleged unlawful conduct.

In order to resolve this ambiguity, in *Wright Line*, the Board established a causation test in all Section 8(a)(1) and (3) cases involving Employer motivation. I am quoting from that decision now. "First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the Employer's decision. Once this is established, the burden will shift to the Employer to demonstrate that the same action would have taken place even in the absence of the protected conduct."

Four points are relevant to the foregoing analytical approach. First, in concluding that the General Counsel has established a *prima facie* showing of unlawful animus, the Board will not quantitatively analyze the effect of the unlawful motive. The existence of such is sufficient to make a discharge a violation of the Act.

Second, once the burden has shifted to the Employer, the crucial inquiry is not whether the Respondent could have engaged in the unlawful acts and conduct herein, but rather, whether Respondent would have done so in the absence of the alleged discriminatees' support for the Union.

Third, pretextual discharge cases should be viewed as those in which the defense of business justification is wholly without merit and the burden shifting analysis of *Wright Line* need not be followed in such cases.

As to the latter point, it is well settled that when

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Respondent's stated motives for its actions are found to be false, the circumstances warrant the inference that the true motive is an unlawful one that the Respondent desires to conceal.

Herein, in my view, there is no doubt that the General Counsel has established a *prima facie* showing that Respondent was unlawfully motivated in terminating employees Tober, Becker and Mendoza.

Thus, it was uncontroverted that Mendoza contacted the Union in early May 1998—excuse me, that Becker contacted the

Union in early 1998; that Becker and Mendoza met with a Union business agent, and that thereafter, several employees including the alleged discriminatees, Tober, Becker and Mendoza, met at the home of Marie Wieczorek on June 10, 1998, with a Union business agent.

Now, given my credibility resolutions and earlier findings of fact, I find that Respondent was well aware of the Union activities of Mendoza and Becker, and also that of Tober, given the fact that Woods inquired of Tober whether or not she attended this meeting. I think that there can be no doubt that the Respondent was aware of the Union activities of each of the alleged discriminatees.

Further, there was a surfeit of record evidence, establishing Respondent's animus towards the alleged discriminatees. First and foremost, is the question of timing.

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The Union meeting which the employees attended, occurred on June 10.

Respondent admits that the decision to terminate the alleged discriminatees was made on June 11th. The question of timing is suggestive of unlawful considerations, underlying the Respondent's action.

Secondly, I have considered the statement made, admittedly made by Woods, to Tober during the discharge conversation on June 15th.

The question was whether Tober had met with any former employees in order to disrupt Respondent's operations. Given the fact that I think Woods full well knew that this was a Union organizing meeting, and that the employees were engaged in Union activities, the word "disrupt" could only have meant that such conduct would inure against the benefit of Respondent.

Finally, as I will discuss later, I think that much of Respondent's defense in this case is a sham. And as I indicated earlier, when the Respondent's stated motives for its actions are found to be false, circumstances warrant the inference that the true motive is an unlawful one that Respondent desires to conceal.

Given the foregoing, I find that the General Counsel has made a *prima facie* showing sufficient to compellingly establish that Respondent was unlawfully motivated in terminating the three alleged discriminatees, Jean Tober, Pauline Becker and

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Myrna Mendoza.

In these circumstances, the burden shifted to Respondent to establish by a preponderance of the relevant record evidence, that notwithstanding the clear evidence that it harbored unlawful animus toward the alleged discriminatees, it nevertheless, would have terminated Tober, Becker and Mendoza for business considerations.

Now, at the outset I indicated that I do not and shall not credit any of the testimony of Martina Wertz with regard to her reasons for the termination of the alleged discriminatees. I found her testimony not worthy of belief, and rather far fetched and incredible.

However, two employees, Vera Smirnoff and Lilia Schaeffer, testified with regard to certain acts of misconduct by Tober and Mendoza. I found both employees credible witnesses. The demeanor of each was that of an honest witness. And I believe that each one testified candidly.

However, notwithstanding their testimony, there is no evidence that either Smirnoff or Schaeffer ever reported to Respondent what either had observed.

Moreover, I want to turn for a moment to the question of whether or not the three alleged discriminatees were working during a probation period. Now, at the outset, as counsel for the General Counsel indicated to me, that even during the probation period, employees remain protected by the

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Act.

Two of the alleged discriminatees, Tober and Becker, testified convincingly that during a meeting with the Royal Caribbean employees on March 10th, James Woods specifically raised the 90 day probationary period, and waived it for the then current Royal Caribbean employees and future employees of Respondent.

Now, I note that in this case, the testimony of Wertz and Woods is corroborated by Respondent's Exhibit No. 2, the letter which was given to all the employees prior to or at that meeting. The record is unclear. And so on face value, it would seem that that letter corroborates Woods and Wertz, that in fact the probationary period was not waived at that meeting.

However, another individual who was at that meeting testified at this hearing. That was Mary Ann Micklo-Reyes. She was called as a witness by Respondent, testified with regard to the fact that she was at the meeting, and gave extensive testimony about a conversation which occurred after the meeting.

Significantly for my purposes, and for our purposes here, she was not asked by Respondent, any questions about the meeting. The failure to ask any questions of her, leads me to draw the inference that if she had been asked questions about the meeting, she would have corroborated Tober and Becker with regard to the waiving of the 90 day probationary period by

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Respondent.

Now, I have considered whether or not—putting aside the witness' testimony, in the real world would the Respondent have waived that 90 day probationary period. And I think that the answer is yes. I think that as a good faith measure, both to Royal Caribbean and to the employees who would subsequently apply for work with Respondent, it would have been a good business decision by Respondent to waive that 90 day probationary period, notwithstanding what was stated in the letter. And I think that Mr. Woods did so.

Several other aspects of the defense also convinced me, as I indicated earlier, that it was and is nothing but a sham and an afterthought.

I am particularly taken by a real inconsistency between the testimony of Martina Wertz and James Woods. Now, parenthetically, as you all know, and I questioned Wertz closely about whether or not she met with any of the alleged discriminatees and discussed with them, their misconduct or bad behavior, or whatever you want to call it, while working on the Mondays and Fridays at the pier.

She indicated to me that it was not Respondent's policy to hold such meetings. In her words, she does not counsel employees "because it is just not our Company policy that we do it—excuse me. She testified that she does not counsel employees "because it is just our Company policy that we do it

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on a general basis." And her testimony was in fact that rather than meeting face-to-face with the alleged discriminatees on their perceived misbehavior, she discussed this generally at Union meetings—at employee meetings. And by the way, I will find that only two such meetings occurred, on or about April 3, and on or about June 5. Those are the two meetings on which Respondent had written agendas as to what would be discussed.

Significantly, testifying on the same subject, notwithstanding that Wertz had said that it was a general practice not to hold these meetings, Woods gave a different version of Respondent's practice. Woods version was that during employees' probation periods, it did not meet with individual employees to discuss individual actions. Rather, it was done on the general basis. It was only after their probationary periods that Respondent met with employees on an individual basis and counseled them about perceived misconduct on-the-job or perceived problems on-the-job.

This, to me, was a rather blatant contradiction, especially when considering the nature of Respondent's defense. Moreover, with regard to the meetings, it strained my cagulity to believe that Wertz admitted meeting with another employee during her probationary period, who had been the subject of certain customer complaints, while refusing to meet with any of the alleged discriminatees, the conduct of which could very well have risen to the same customer complaint. It is just

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incredible to me to believe that Respondent would have met with an employee who was actually the subject of a complaint during her probationary period and not met with the alleged discriminatees whose conduct at least in one instance, was critically worse, and I will get to that in a moment, and to head off potential written complaints to Royal Caribbean.

It seems to me, parenthetically, that given that Respondent had only had a contract to do this work for a few months, that it would have done anything it could to have headed off the filing of customer complaints. And one way to have done that, obviously, would have been to counsel the three alleged discriminatees with regard to their perceived work problems, and to have them stop it before anything substantively occurred.

I asked Wertz several times if she could give us specifics as to any of the misconduct engaged in by any of the three alleged discriminatees. She did come up with one instance of misconduct, which appears on its face to be quite serious. That is the alleged incident with the Taiwanese individuals for whom Mendoza was supposed to obtain their passports before leading them off the buses, they were on.

Notwithstanding the fact that Mendoza denied engaging in that misconduct, and parenthetically again, I credit her denial in that regard, but it seems incredible to me that no notation of this incident appears in the—or no notation of this incident appears in the personnel file of Mendoza and Wertz

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never even bothered to counsel her about the incident. I find that absolutely incredible.

And finally, in the one portion of the case, as I indicated to counsel I find most distasteful, I must discuss the credibility conflict between Myrna Mendoza and her sister, Gloria Lopez. I found Lopez to be a deceitful witness. Her demeanor was that of a mendacious witness, one who was afraid of telling the truth, and one who, in order to cover up, lied on the witness stand. I do not credit her that she did not question Mr. Woods with regards to the reason for her sister's termination. I find that rather—I found that testimony wholly incredible.

Rather, I find that during this conversation, about which Ms. Lopez reported to Myrna Mendoza, I'm crediting Mendoza's testimony now, I find that Lopez told Mendoza that Woods reported to her that he was "very disappointed that he would have to let me go, because I was one of the best."

In these circumstances, including the surfeit of record evidence establishing unlawful animus, including my belief that Respondent's defense is nothing but a sham and an afterthought, the conclusion is mandated that Respondent has failed to establish by a preponderance of the evidence, that it would have terminated the three alleged discriminatees on June 15, notwithstanding their support for the Union and their Union activities.

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Accordingly, I find that Respondent violated Section 8(a)(1) and (3)of the Act by terminating employees Jean Tober, Pauline Becker and Myrna Mendoza on June 15, 1998.

These are my conclusions of law. Respondent is an Employer engaged in commerce within the meaning of Section 2(2) and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

By creating in the minds of its employees the impression that it was engaging in surveillance of their Union and other protected, concerted activities, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

By interrogating employees with regard to their Union activities, Respondent engaged in conduct violative of Section 8(a)(1) of the Act.

By discharging employees who engaged in Union or other protected, concerted activities, in order to discourage its employees from supporting the Union, Respondent engaged in acts of conduct violative of Section 8(a)(1) and (3) of the Act.

The above described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act. And finally, unless specified above, Respondent has engaged in no other unfair labor practice.

Having found that Respondent engaged in serious unfair labor practices violative of Section 8(a)(1) and (3) of the Act,

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I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act.

I have concluded that Respondent terminated its employees Jean Tober, Myrna Mendoza and Pauline Becker because they engaged in Union or other protected, concerted activities.

Accordingly, I shall recommend that Respondent be ordered to offer each one immediate and full reinstatement to her former position of employment, or if such a position no longer exists, to a substantially equivalent one, without prejudice to her seniority and the rights and privileges of employment, and to make each whole for any loss of earnings and benefits she may have suffered as a result of Respondent's unlawful discrimination, with interest. Such amount shall be computed in the manner set forth by the Board in its decisions in *F. W.*

Woolworth Co., with interest compounded in accordance with *New Horizons for the Retarded*.

I shall also recommend that the Respondent be ordered to expunge from its files, any reference to the terminations, and to notify the discriminatees that this has been done, and that those unlawful acts will not be used against each in any way.

Okay. What I will do is certify the decision as it is printed in the text, and then I will attach to it, my formal order and the attached notice. And I will attach to it a notice to employees which will have to be posted by Respondent.

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Now, as you all know, exceptions can be taken to this decision. What I will send to you will have the instructions for the filing of any exceptions and the address for the filing of any exceptions, if anyone cares to do so.

Is there anything that anyone has to say before I close the record?

(No response.)

JUDGE LITVAK: All right. Hearing nothing, the record is now closed.

(Whereupon, the record in the above-mentioned matter, was closed at 2:00 p.m.)